IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GEORGE K. WHITMAN III, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11622 Trial Court No. 4BE-09-265 CI MEMORANDUM OPINION No. 6300 — March 9, 2016

Appeal from the Superior Court, Fourth Judicial District, Bethel, Dwayne W. McConnell, Judge.

Appearances: Glenda Kerry, Girdwood, for the Appellant. Michael Sean McLaughlin, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge MANNHEIMER.

George K. Whitman III appeals the superior court's dismissal of his petition for post-conviction relief. In his petition, Whitman asserted that his trial attorney failed to provide him with competent representation, but the superior court dismissed the

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

petition for failure to present a *prima facie* case of attorney incompetence. Having examined the record, we uphold the superior court's ruling.

We described the facts of Whitman's underlying criminal case in our decision of Whitman's direct appeal: *Whitman v. State*, unpublished, 2008 WL 2697765 (Alaska App. 2008). In July 2004, Whitman went to visit two elders in Bethel, a man and a woman. Without warning, Whitman attacked the man, repeatedly beating and kicking him, and leaving him with permanent brain damage. Whitman then raped the woman. Based on this episode, Whitman was charged with first-degree assault and first-degree sexual assault.

The Public Defender Agency was initially appointed to represent Whitman, but the Agency quickly withdrew because the victims' daughter, D.L., worked for the Agency. The Office of Public Advocacy (OPA) was then appointed to represent Whitman.

The supervising attorney in OPA's Bethel office, Brian Kay, initially was assigned to Whitman's case. But Whitman refused to cooperate with Kay, so Kay assigned another attorney in his office, Anne Marshall, to represent Whitman.

Ultimately, Whitman's case went to trial, and the jury found him guilty. This Court affirmed his convictions and sentence on appeal.

After this Court affirmed his convictions, Whitman filed a *pro se* petition for post-conviction relief. The superior court appointed an attorney to represent Whitman in the post-conviction relief action, and this attorney filed an amended petition. This petition was ultimately dismissed for failure to state a *prima facie* case for relief.

In his petition, Whitman alleged that his trial attorneys had been ineffective in several different ways; but on appeal, Whitman pursues only one of these allegations. Whitman claims that both of his OPA attorneys — Kay and Marshall — failed to give

him zealous representation because they labored under a conflict of interest stemming from their friendship with D.L., the victims' daughter.

Kay and Marshall knew D.L. because (as we have already explained) D.L. worked for the Public Defender Agency. Whitman argues that, given the small number of people providing government and legal services in Bethel, Kay and Marshall necessarily had such a close personal relationship with D.L. that it impaired their ability to zealously represent Whitman.

In support of these conclusions, Whitman submitted an affidavit in which he stated that he "believe[d]" that Kay and Marshall were friends with [D.L.], and that this friendship "kept [Kay and Marshall] from helping [him] with [his] case". Whitman also stated that, sometime after his trial was over, Kay hired D.L. to work for the Office of Public Advocacy.

Kay submitted an affidavit in which he stated that he was acquainted with D.L. at the time of Whitman's trial, but he was not personal friends with her. Marshall also submitted an affidavit in which she stated that she was not personal friends with D.L., and that she was aware of D.L. only because D.L. worked for the Public Defender Agency.

Based on this record, the superior court granted the State's motion to dismiss Whitman's petition for failure to state a *prima facie* case.

When the question is whether an applicant for judicial relief presented an adequate *prima facie* case, appellate courts often describe the applicable test as whether the applicant would be entitled to relief if we assumed that all of the applicant's assertions were true. But this description of the test is inexact.

As this Court explained in *LaBrake v. State*, 152 P.3d 474 (Alaska App. 2007), the rule about assuming the truth of the applicant's assertions of fact does not apply to "statements concerning the law", nor to statements "concerning mixed questions

of law and fact (*e.g.*, ... assertions concerning the legal effect or categorization of the underlying occurrences)", nor does the rule apply to "conclusory ... *pro forma* assertions of the ultimate facts to be proved when these assertions are not supported by specific details." 152 P.3d at 481. [1]

In the present case, Whitman asserted that he "believed" Kay and Marshall were friends with D.L., but he offered no basis for this belief other than the fact that all three of them worked for criminal justice agencies in the same small town, and the fact that Kay hired D.L. sometime after Whitman's trial ended.

As to Whitman's assertion that this purported friendship prevented Kay and Marshall from zealously representing Whitman in his criminal case, *LaBrake* holds that the superior court was not required to assume the truth of this type of "conclusory" and "*pro forma*" assertion of the ultimate fact to be proved.

For these reasons, we agree with the superior court that Whitman's petition did not offer a *prima facie* case for relief. Accordingly, the judgement of the superior court is AFFIRMED.

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[1] Citing Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (3rd ed. 2004), § 1368, Vol. 5C, p. 255.